

121 FERC ¶ 61,159
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Texas Eastern Transmission, LP

Docket No. CP07-411-000

ORDER ISSUING CERTIFICATE

(Issued November 15, 2007)

1. On June 29, 2007, Texas Eastern Transmission, LP (Texas Eastern) filed an application, pursuant to section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's regulations, seeking authorization to construct and operate certain pipeline lateral facilities, consisting of approximately 3.79 miles of 20-inch diameter pipeline, a meter and regulating station and ancillary facilities (Cedar Bayou Lateral Project).¹ Texas Eastern states that the lateral will allow it to provide up to 360,000 dekatherms per day (Dth/d) of firm transportation service to the Cedar Bayou Power Plant owned by NRG Energy, Inc. (NRG). Texas Eastern also requests permission to establish initial incremental rates for firm and interruptible service under its existing Rate Schedule MLS-1 for service on the lateral. For the reasons discussed herein, the Commission grants the requested authorizations, subject to conditions.

Project Description

2. The Cedar Bayou Lateral Project facilities will enable Texas Eastern to provide service to the Cedar Bayou Power Plant, a natural gas-fired power plant located in Chambers County, Texas, about 25 miles east of Houston. Texas Eastern has executed a precedent agreement with NRG's affiliate, NRG Power Marketing, to provide 360,000

¹ Texas Eastern notes that the Cedar Bayou Lateral would have qualified for construction under Texas Eastern's blanket construction certificate but for the fact that Texas Eastern desires to provide service on the lateral at an incremental rate. Citing *Tennessee Gas Pipeline Co.*, 110 FERC ¶ 61,047 (2005) (a pipeline must file a full section 7 application for approval of all facilities for which the pipeline will charge an incremental rate for service).

Dth/d of firm transportation service for a primary term of ten years under Rate Schedule MLS-1 to serve the Cedar Bayou Power Plant.

3. In addition, Texas Eastern states that it will execute a negotiated rate agreement with NRG Power Marketing within 30 days after the execution of the precedent agreement. It states that NRG Power Marketing will also execute a discounted firm backhaul transportation service agreement under Texas Eastern's Rate Schedule FT-1 with a Maximum Daily Quantity (MDQ) of 100,000 Dth/d for a primary term of ten years.

4. Texas Eastern proposes to establish an initial incremental recourse rate for firm and interruptible transportation services provided on the Cedar Bayou Lateral. The proposed incremental rates under Rate Schedule MLS-1 are based on a cost of facilities of \$16,514,000, with an overall rate of return of 12.13 percent² and a depreciation rate of 5 percent, which is based on an assumed useful life of 20 years for the lateral line facilities. Texas Eastern designed the incremental rates using the cost-of-service factors underlying its current rates. The incremental rates reflect a \$4,006,483 annual cost of service³ and a capacity of 360,000 Dth/d.

5. Texas Eastern also states that the proposed route for the lateral is within the existing CenterPoint Energy electric transmission corridor and the Bayer Material Science, LLC pipeline right-of-way. Thus, it maintains its proposal will not have any significant environmental or landowner impacts.

Notice and Interventions

6. Notice of Texas Eastern's application was published in the *Federal Register* on July 18, 2007 (72 Fed. Reg. 39,395). Timely motions to intervene were filed by Conectiv Energy Supply, Inc., Delmarva Power & Light Company, PSEG Energy Resources & Trade LLC, Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc. and Philadelphia Gas Works, National Fuel Gas Distribution Corporation

² The rate of return and other cost of service factors were derived from Texas Eastern's cost of service settlement, as amended in Docket No. RP98-198-000, *et al.*, and approved by a Letter Order issued on August 28, 1998. *See Texas Eastern Transmission Corp.*, 84 FERC ¶ 61,200 (1998).

³ The first year cost-of-service of \$4,006,483 includes \$1,964,367 of return on rate base, \$825,700 of depreciation expenses, \$82,194 for operation and maintenance expenses, \$655,594 of federal income taxes, \$99,183 of state income taxes and \$379,445 for taxes other than income.

and the Municipal Defense Group. Timely notices of intervention are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. §385.214(a)(2)(2007)). No protests were filed.

Discussion

A. The Certificate Policy Statement

7. On September 15, 1999, the Commission issued a Policy Statement⁴ providing guidance as to how proposals for certificating new construction will be evaluated. Specifically, the Policy Statement explains that the Commission, in deciding whether to authorize the construction of new pipeline facilities, balances the public benefits against the potential adverse consequences. Our goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

8. Under this policy the threshold requirement for existing pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of a new pipeline. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission then proceed to complete the environmental analysis where other interests are considered.

9. As stated, the threshold requirement of the Policy Statement is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. Here, Texas Eastern proposes to collect all costs associated with the project through an incremental rate based on the costs of providing service to shippers on the facilities. Since this rate will be paid only by shippers utilizing the project, Texas Eastern's proposal satisfies the no-subsidization requirement.

⁴*Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶61,227 (1999); *order clarifying statement of policy*, 90 FERC ¶61,128 (2000); *order clarifying policy*, 92 FERC ¶61,094 (2000) (Policy Statement).

10. Next, there should be no adverse impact on Texas Eastern's existing customers since the proposed project will not degrade any service they receive but should supply them with increased market options. This project should not harm existing pipelines in the market or their captive customers because the proposal is for new incremental service and is not intended to replace existing customers' services on any other pipeline. The project is designed to supply the Cedar Bayou Power Plant with direct access to Texas Eastern's facilities for the first time, thereby enhancing the power plant's access to diverse supplies, enhancing competition and increasing reliability of natural gas service to the plant.

11. The effects on landowners and surrounding communities have been minimized because the proposed pipeline route runs along an existing utility corridor that serves the Cedar Bayou Power Plant. The only section of the proposed route outside the utility corridor is at the southern end of the project, where it crosses property owned by CenterPoint. We note that no landowner filed adverse comments to this project.

12. For these reasons, the Commission finds that the Cedar Bayou Lateral Project is required by the public convenience and necessity. It will provide access to additional and diverse sources of gas for the Cedar Bayou Power Plant thereby improving the efficiency and reliability of electric generation capacity in southeastern Texas. Consistent with our standard practice, we will condition our certificate so that construction cannot commence until after Texas Eastern executes contracts that reflect the levels and terms of service represented in its precedent agreements.⁵

B. Rates

13. Texas Eastern submitted a pro forma tariff sheet with the proposed incremental recourse rates for firm and interruptible service under Rate Schedule MLS-1 for the Cedar Bayou Lateral. Texas Eastern proposes a Reservation Charge of \$0.927/Dth, a Usage-2 Charge of \$0.0305/Dth, and a Reservation Charge Adjustment of \$0.0305/Dth for firm service. Texas Eastern proposes a Usage-1 Charge of \$0.0305/Dth and a Usage-2 Charge of \$0.0305/Dth for interruptible service. The Commission finds that the proposed initial incremental recourse rates established in Texas Eastern's filing are reasonable. The Commission directs Texas Eastern to file an actual tariff sheet no sooner than 60 days and no later than 30 days prior to the commencement of service detailing the incremental rates as proposed.

14. Texas Eastern is proposing to enter into a negotiated rate agreement under Rate Schedule MLS-1 with NRG Power Marketing. In certificate proceedings, we establish initial recourse rates, but do not make determinations regarding specific negotiated rates

⁵ See, e.g., *Tennessee Gas Pipeline Co.*, 101 FERC ¶ 61,360 at P 21 (2002)

for proposed services.⁶ In order to comply with the Alternative Rate Policy Statement,⁷ and the Commission's decision in *NorAm Gas Transmission Company*,⁸ Texas Eastern is directed to file either the negotiated rate agreement or a tariff sheet describing the negotiated rate agreement, at least 30 but not more than 60 days before service commences. The tariff sheet must state for each shipper paying a negotiated rate the following information: (1) the exact legal name of the shipper; (2) the total charges (the negotiated rate and all applicable charges); (3) the receipt and delivery points; (4) the volumes of gas to be transported; (5) the applicable rate schedule for the service; (6) any formula upon which the negotiated rate is designed; and (7) a statement affirming that the negotiated rate contract does not deviate in any material aspect from the form of service agreements in its tariff.

15. Texas Eastern must also disclose all considerations linked to the agreement. In addition, Texas Eastern is required to maintain separate and identifiable accounts for any volumes transported, billing determinants, rate components, surcharges, and revenues associated with its negotiated rates for the project in sufficient detail so that they can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate proceedings. When Texas Eastern files its negotiated rate agreement or tariff sheet under section 4 of the NGA, interested parties may protest if they believe the rates are discriminatory.

C. Environment

16. On August 13, 2007, we issued a Notice of Intent to Prepare an Environmental Assessment for the Proposed Cedar Bayou Lateral Project and Request for Comments on Environmental Issues (NOI). The NOI was sent to about 90 individuals, organizations, federal and state agency representatives, county and local government agencies, elected officials, property owners along the proposed pipeline route, and other interested individuals. We received no responses to the NOI.

⁶ *CenterPoint Energy-Mississippi River Transmission Corp.*, 109 FERC ¶ 61,007, at P 19 (2004); *ANR Pipeline Co.*, 108 FERC ¶ 61,028, at P 21 (2004).

⁷ *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines* (Alternative Rate Policy Statement), 74 FERC ¶ 61,076 (1996), *order granting clarification*, 74 FERC ¶ 61,194, *reh'g and clarification denied*, 75 FERC ¶ 61,024 (1996), *reh'g denied*, 75 FERC ¶ 61,066 (1996), *pet. for review denied*, *Burlington Resources Oil & Gas Co. v. FERC*, Nos. 96-1160, *et al.* U. S. App. LEXIS 20697 (D.C. Cir. July 20, 1998); and *Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042 (2006).

⁸ 77 FERC ¶ 61,011 (1996).

17. Our staff prepared an environmental assessment (EA), which was issued on October 5, 2007, to satisfy the requirements of the National Environmental Policy Act. The EA assessed the potential environmental effects of Texas Eastern's proposed project on geology, soils, water resources, vegetation, wildlife, fisheries, threatened and endangered species, land use, cultural resources, air quality, and noise. The EA also addressed alternatives to the proposed project.

18. Based on the discussion in the EA, we conclude that if constructed in accordance with Texas Eastern's application and supplemental data response filed September 28, 2007, and the environmental conditions in the appendix to this order, approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment.

19. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between natural gas companies and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction, replacement, or operation of facilities approved by this Commission.⁹

20. Texas Eastern shall notify the Commission's environmental staff by telephone, e-mail or facsimile of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Texas Eastern. Texas Eastern shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

Conclusion

21. For the reasons discussed and with the conditions imposed herein, the Commission finds that the certificate authorization requested by Texas Eastern is required by the public convenience and necessity.

22. At a hearing held on November 15, 2007, the Commission on its own motion, received and made part of the record all evidence, including the application and exhibits thereto, submitted in this proceeding and upon consideration of the record,

⁹See, e.g., *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *National Fuel Gas Supply v. Public Service Comm'n*, 894 F.2d 571 (2d Cir. 1990); and *Iroquois Gas Transmission System, L.P.*, 52 FERC ¶61,091 (1990) and 59 FERC ¶61,094 (1992).

The Commission orders:

(A) A certificate of public convenience and necessity is issued to Texas Eastern pursuant the section 7(c) of the NGA authorizing Texas Eastern to construct and operate the natural gas facilities, as described and conditioned herein, and as more fully described in the application.

(B) The certificate authority issued in Ordering Paragraph (A) is conditioned upon the following:

- (1) Texas Eastern's completing the authorized construction of the proposed facilities and making them available for service within one year of the issuance of this order pursuant to section 157.20(b) of the Commission's regulations;
- (2) Texas Eastern's compliance with all applicable Commission regulations including paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission regulations;
- (3) Texas Eastern complying with the environmental conditions listed in the appendix to this order.

(C) Texas Eastern's proposed incremental recourse rates under Rate Schedule MLS-1 are approved.

(D) Texas Eastern shall file an actual tariff sheet to implement its proposed rates at least 30 days and not more than 60 days before service commences.

(E) Texas Eastern shall file either its negotiated rate agreement with NRG Power Marketing or a tariff sheet describing the transaction, at least 30 days and not more than 60 days prior to the commencement of service on the project for each shipper paying a negotiated rate with the following information:

- (1) the exact legal name of the shipper;
- (2) the total charges (the negotiated rate and all applicable charges);
- (3) the receipt and delivery points;
- (4) the volumes of gas to be transported;
- (5) the applicable rate schedule for the service; and

- (6) a statement affirming that the negotiated rate contract does not deviate in any material aspect from the form of service agreement in the tariff.

Texas Eastern is also directed to disclose all consideration linked to the agreements, and to maintain separate and identifiable accounts for volumes transported, billing determinants, rate components, surcharges, and revenues associated with its negotiated rates in sufficient detail so that they can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case.

(F) Texas Eastern must execute a firm contract with NRG Power Marketing equal to the level of firm service and terms of service represented in the precedent agreement prior to commencing construction.

(G) Texas Eastern shall notify the Commission's environmental staff by telephone, e-mail or facsimile of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Texas Eastern. Texas Eastern shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix Environmental Conditions

1. Texas Eastern shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EA, unless modified by the Commission Order. Texas Eastern must:
 - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
 - b. justify each modification relative to site-specific conditions;
 - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
 - d. receive approval in writing from the Director of the Office of Energy Projects (OEP) **before using that modification.**
2. The Director of OEP has delegation authority to take whatever steps are necessary to ensure the protection of all environmental resources during activities associated with construction and operation of the project. This authority shall allow:
 - a. the modification of conditions of the Commission Order; and
 - b. the design and implementation of any additional measures deemed necessary (including stop-work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from construction.
3. **Prior to any construction**, Texas Eastern shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EI), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.
4. The authorized facility location shall be as shown in the EA, as supplemented by filed alignment sheets and data responses. **As soon as they are available, and before the start of construction**, Texas Eastern shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for the facility approved by the Commission Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

Texas Eastern's exercise of eminent domain authority granted under Natural Gas Act (NGA) section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Texas Eastern's right of eminent domain granted under NGA section 7(h) does not authorize it to increase the size of its natural gas pipeline to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. Texas Eastern shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP **before construction in or near that area.**

This requirement does not apply to extra work space allowed by Texas Eastern's Erosion and Sedimentation Control Plan and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

- a. implementation of cultural resources mitigation measures;
 - b. implementation of endangered, threatened, or special concern species mitigation measures;
 - c. recommendations by state regulatory authorities; and
 - d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.
6. Texas Eastern shall file updated status reports prepared by the EI with the Secretary on a **bi-weekly basis until all construction-related activities, including restoration and initial permanent seeding, are complete.** On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:

- a. the current construction status of the project, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas;
 - b. a listing of all problems encountered and each instance of noncompliance observed by the EI during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
 - c. a description of corrective actions implemented in response to all instances of noncompliance, and their cost;
 - d. the effectiveness of all corrective actions implemented;
 - e. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Commission's Order, and the measures taken to satisfy their concerns; and
 - f. copies of any correspondence received by Texas Eastern from other federal, state or local permitting agencies concerning instances of noncompliance, and Texas Eastern's response.
7. Texas Eastern must receive written authorization from the Director of OEP **before commencing service** of the project. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas of project-related disturbance are proceeding satisfactorily.
8. **Within 30 days of placing the certificated facilities in service**, Texas Eastern shall file an affirmative statement with the Secretary, certified by a senior company official:
 - a. that the facilities have been constructed and installed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
 - b. identifying which of the Certificate conditions Texas Eastern has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.
9. If a horizontal directional drill (HDD) is determined to not be feasible or an initiated HDD can not be completed, Texas Eastern shall not begin an alternate method of construction of that crossing until Texas Eastern files an alternate crossing plan for the review and written approval of the Director of OEP.
10. **Prior to construction**, Texas Eastern shall file an HDD noise analysis and mitigation plan, for the review and written approval of the Director of OEP, indicating how noise levels will be controlled so they do not exceed a day-night

sound level of 55 decibels on the A-weighted scale at any nearby noise-sensitive areas (NSAs), or alternatively, what mitigation would be offered to the residents of those NSAs.